

GOVERNMENT BY BALLOT

ARIZONA CONSTITUTION—INITIATIVE, REFERENDUM, AND RECALL

It is the old contest between idealism and stubborn, matter-of-fact reality. It is the story of the philosopher's stone over again—the dream of transmuting all the metals into gold—the hunt for the master key that will open all locks, however different in size and shape—the problem of fitting square pegs into round holes—the puzzle of how to eat one's cake and have it—the search for the chimera of perpetual motion—the quest for the mythical pot of gold at the foot of the rainbow—and all the other impossible undertakings which have vexed men's souls and turned their brains and filled the lunatic asylums since mankind was divided into those who see facts and those who see visions.

SPEECH

OF

HON. GEORGE SUTHERLAND
OF UTAH

IN THE

SENATE OF THE UNITED STATES

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S P E E C H
OF
HON. GEORGE SUTHERLAND.

The Senate having under consideration the joint resolution (H. J. Res. 14) to admit the Territories of New Mexico and Arizona as States into the Union upon an equal footing with the original States—

Mr. SUTHERLAND said:

Mr. PRESIDENT: During the last few years the United States of America has become the field of operation for an amiable band of insurgent soothsayers, who have been going up and down the land indulging in cabalistic utterances respecting the initiative, the referendum, the recall, and divers and sundry other ingenious devices for realizing the millenium by the ready and simple method of voting it out of its present state of incubation. They direct our attention to the clouds flying above the far western horizon, upon which the flaming finger of the Oregon sun has traced, in radiant and opalescent tints, glowing pathways and shining minarets, stately temples and castles and palaces, pinnacles of gold and caves of purple, and they tell us that these are the visible signs which mark the exact location of the new and improved political Jerusalem, where the wicked officeholders cease from troubling and the weary voters do all the work. They bid us join them in an airy pilgrimage to this scene of pure delight, and assure us that here, high above all selfish and mundane things, is the land "flowing with milk and honey," where every bird is a songster, where the exquisite and perfect flowers of political purity are in perpetual bloom, where "every prospect pleases" and only the "standpatter" is vile, where all the laws are perfect and corruption and wickedness are forgotten legends.

A good many people are accepting the invitation, without taking the precaution to secure return tickets.

As an humble observer of this spectacular enterprise I have thought it worth while to interrupt the somewhat monotonous consideration of the reciprocity bill long enough to suggest some reasons for anticipating the abrupt and inevitable return of these hopeful aeronauts to the solid earth after these alluring visions shall have faded into the damp and ghostly fog, the cold

and unsubstantial mist, of which they are composed, and into which certain enthusiastic but irresponsible "balloonatics" have carried them in a balloon all gas and no ballast.

The conditions to which I have thus briefly alluded find a striking illustration in the proposed constitution of Arizona, which is now before the Senate for consideration. There has been more or less controversy respecting the precise authority of Congress in dealing with the proposed constitutions of Arizona and New Mexico. It has been broadly asserted that the only authority of Congress is to determine whether or not these proposed constitutions establish a government republican in form and contain certain provisions definitely specified by the enabling act. The so-called New Mexico-Arizona enabling act provides that—

When said constitution and such provisions thereof as have been separately submitted shall have been duly ratified by the people, * * * a certified copy of the same shall be submitted to the President * * * and to Congress for approval. * * * And if Congress and the President approve said constitution and the separate provisions thereof, if any, or if the President approves the same and Congress fails to disapprove the same during the next regular session thereof, then and in that event the President shall certify said facts to the governor, * * * who shall, within 30 days after the receipt of said notification, * * * issue his proclamation for the election of the State and county officers—

And so on.

Before either New Mexico or Arizona is entitled to admission, four distinct steps are required:

1. The framing of the constitution and its submission to a vote of the people of the State.
2. The adoption of the constitution by a majority vote of the people.
3. The approval of the constitution by the President; and
4. The failure of Congress to disapprove the same at the next regular session after the approval of the President.

Neither the authority of the President nor of Congress in passing upon this question is limited by any language in the enabling act. In terms their power to approve or disapprove is as broad as that of the people in voting upon the question of the ratification or rejection of the proposed constitution. If the President's authority is limited, it is not because of anything in the enabling act, but from the fact that the power to admit new States is one belonging to Congress, which can not be delegated by that body to the President, and it may be well contended that while Congress could delegate to the President the power to determine the existence of a fact—as, for

example, that the constitution provided for a government republican in form and contained certain specified provisions upon the existence of which the admission of the State should depend—Congress could not delegate the power to admit or decline to admit the State at his discretion. However this may be so far as the President is concerned, no such limitation attaches to the power of Congress.

The Senate Committee on Territories, reporting the bill to enable the people of Arizona and New Mexico to form constitutions, after calling attention to the provision—

That the President and Congress, representing the Nation, shall review the constitutions of the proposed new States which the Nation is about to admit as a portion of its governing and lawmaking elements—

And to the further fact—

that the Nation is interested as vitally in the form of government of the States which it creates as are the new States themselves—

Said:

It is not only a measure of justice, but a measure of safety which will certainly *prevent any unsound or harmful provisions* in the constitutions of the proposed new States. This, of course, will be beneficial to the proposed new States as well as to the Nation.

Clearly, then, it was contemplated that the responsibility of Congress in the matter should attach to every part of the constitutions, because the power is to be exercised so as to “prevent any unsound or harmful provisions in the proposed constitutions.”

This was the view of the Senator from Indiana, Mr. Beveridge, chairman of the committee, who said that by this requirement there was—

afforded a safeguard as to the *wisdom* of its provisions. A constitution is no light thing. It can not hurt anybody to have a constitution carefully drawn; it may help wonderfully to have it reviewed. It is sure to be not less thoughtful on that account. Also, the Nation is as much concerned as the State, for the State is to become a part of the governing power of the Nation.

In the consideration of either of these constitutions, therefore, the entire instrument is before us, and if upon the whole it is of such character or contain such provisions that Congress should not approve, it is the plain duty of that body to disapprove. We shall not, of course, disapprove for light or trivial reasons, but if there is contained in either constitution provisions which we believe to be radically wrong or subversive of the principles of good government, I conceive it to be our plain duty under the enabling act to so declare.

Complaints have been made respecting both the proposed constitutions of New Mexico and Arizona. The principal ob-

jection to the New Mexico constitution is that the power of amendment is not sufficiently elastic; that amendments will be too difficult to obtain. With that criticism I am unable to agree. It seems to me that the proposed constitution of New Mexico, like that of Arizona, may be justly criticized for ignoring the principle that constitutions are made to declare and establish fundamental law as distinguished from ordinary legislation. Both constitutions exhibit an unfortunate tendency to deal overmuch with mere details which should have been left to legislation. That, however, is an incident with which we should not, I think, undertake to deal. Legislative acts should be capable of being readily changed to suit the sometimes rapidly changing needs of the community, but constitutions are, or should be, declarations of the permanent, settled, broadly fundamental policies of the State, not to be lightly altered upon the mere caprice of the moment, but only after the most serious and deliberate consideration.

Prof. Stimson admirably states the distinction, as follows:

The Constitution is the permanent will of the people; the law is but the temporary act of their representatives, who have only such power as the people choose to give them.

If the Constitution of the United States had provided for its own amendment as easily as some few of the State constitutions provide, that great instrument would long since have become a medley of incongruous provisions and a patchwork of the shifting foibles of every generation. A written constitution means nothing unless it means stability and permanency. It is the *fundamental law*, the *foundation* upon which rests the whole superstructure of the State; and, like the foundation of a great building, the continual tearing out of a stone here and the insertion of another there will threaten the integrity of the whole structure. To call a constitution which may change with every shifting breath of popular emotion "fundamental law" is a perversion of language. Such a constitution is not to be likened to the foundation of an edifice, but rather to the weathercock upon the steeple, that simply registers the direction of each passing breeze.

The objections to the New Mexico constitution, compared with the Arizona constitution, are not, to my mind, of a serious character, and I shall not spend further time in their discussion, but confine myself to the Arizona constitution; and inasmuch as the features of that instrument which seem to me objectionable are illustrative of what I conceive to be an unwise, dangerous, and growing tendency toward the gradual breaking down of the American system of government through-

out the country, I shall discuss the subject in a somewhat general way. I am aware of the fact that it is not fashionable to find fault with any of the new-fangled political fads which are being rather intemperately advocated under the claim of restoring a government by the people. Anyone who doubts the wisdom of the initiative and referendum, the recall, or the direct primary is at once set down by certain self-constituted guardians of the people's rights as a "reactionary" or a "standpatter," and only those who accept the whole program from prologue to epilogue are considered worthy to be called progressive.

Somebody has defined a standpatter as a man who has stopped and can not start and a progressive as one who has started and can not stop. If these definitions are to be accepted as accurate, sensible people will avoid both schools. It would seem to be the part of wisdom to delay starting at least long enough to ascertain where we are going and why, and then to keep going as long as we are headed in the right direction, and to stop whenever we discover that we have lost our bearings. Movement and improvement are not always synonymous terms. Just now there is a good deal of political and social unrest, not only among our own people, but throughout the world. That there is justification for much of the dissatisfaction which exists can probably not be truthfully denied. The conditions, however, which have given rise to this feeling call for sane, wise, level-headed counsel and consideration. But instead of these the agitator is abroad and confusion of thought results. Evils exist as they have always existed. Many remedies are being suggested, some of them good, some of them foolish, many of them utterly vicious and impracticable. There are quacks in politics as there are quacks in medicine, and in the one case as in the other, the quack is usually identified by the superabundance of the laudation with which he advertises himself and his remedies.

The value of a remedy in politics, as in medicine, is to be determined by its efficiency as a curative, and not by the name which its compounders have caused to be blown into the bottle or the promises which they have made in their advertising circulars. Between the political quack, who thinks only of himself, and the political zealot, who does not think at all, we are in grave danger of having all the stability and sanity ground out of our institutions. What we need, in my judgment, is not so much the adoption of new, experimental—not to say dangerous—panaceas for the ills of the body politic, as the conscientious and vigorous enforcement of the old and proven remedies.

Sir, we are living in strenuous days. Everybody seems to be afflicted in one form or another with the speed mania. We are not content to jog along in the old family carriage after the comfortable manner of our fathers; we must hurl ourselves through the land in high-power automobiles, dividing the population into the "quick and the dead" as we pass. The stage-coach has been relegated to the scrap heap, and the Twentieth Century Limited has taken its place. The post office has fallen into more or less disuse, and we are carrying on our correspondence over the telegraph wires by night lettergrams and day lettergrams. The housewife no longer shops with market basket upon her arm; she telephones the grocer and adds the bill for both telephones to the cost of living. To do everything more quickly, to travel faster and faster is the growing obsession of the times, and we are eagerly looking forward to the day when we shall fly through the air without the encumbrance of a gasoline tank, drawing propulsive power as we go from the electric waves which fill the universe with the mysterious energy of their rise and fall. The microbe of restlessness has invaded not only our social but our business and political life as well. We are no longer satisfied to lay by a modest competency for our old age by years of thrift and economy. We must get rich over night by betting on the price of wheat. Houses are no longer built from the foundation up, brick upon brick and stone upon stone. Tremendous steel frames, 10, 20, 40 stories in height, are elevated by the aid of steam and crane, and bricks are laid and windows put in upon every floor at the same time. The roof is fastened on before the cellar is finished. It is not strange that in the universal fever of haste government itself should be swept by this mad spirit of impatience, which has given rise to the new apostle of reform, whose demand is that we shall abandon the methodical habits of the past and go careering after novel and untried things. The speed limit has been taken off, the "stop, look, and listen" sign removed, and the importunate cry is, "Full speed ahead! Get somewhere else than where you are—it matters not where—only, in God's name, let it be quickly!"

Changes in governmental forms are advocated apparently for the mere sake of change. So many strange and doubtful experiments are being undertaken that we shall end by finding ourselves overwhelmed by their very multiplicity and impracticability. The minds of the people are being filled with all sorts of idealistic theories, beautiful in promise but ineffective in performance. Every self-constituted reformer brings to the quilting bee his favorite patch, and when the work shall be com-

pleted our scheme of government will be as bizarre as the old-fashioned crazy quilt of our grandmothers. It is high time for a reaction to that ancient but discredited common sense which thinks before it acts instead of repenting afterwards.

It is one of the penalties of advancing civilization that the feet of progress must sometimes go through the mire before they can plant themselves on the firm upland. That man is the truest pilot whose keen vision soonest makes out the direction in which the upland lies and, in safety rather than in haste, leads us to it, and he but a false pilot or an arrant knave, whatsoever he may call himself or howsoever loudly he may anathematize the mire, if he but lead us, however swiftly, round and round the vicious circle within the swamp. The problems with which we have to deal are full of perplexity and complexity. They can not be solved by a simple wave of the hand in a moment of time, by hysterical denunciation, by the undigested theories of the visionary and the dreamer, by the self-serving mouthings of the demagogue, or by the mere counting of heads at the ballot box. They call for thoroughgoing investigation, dispassionate consideration, wise statesmanship, and sometimes for that courageous patience which moves deliberately in the face of clamorous demands to make haste. There is overmuch waving of flags and beating of drums and blowing of horns. The voice of the *professional* reformer is heard in the land insistently calling upon us to forsake the ancient and well-beaten paths along which we have proceeded, at least in security, for a century and a quarter and go headlong in new and unexplored directions, luckily to find ourselves in pleasant fields and firm footing or unluckily plunged over the precipice or engulfed in the dismal swamp.

The so-called popular-government propaganda has for its ostensible object the broadening and strengthening of power in the hands of the people, but its tendency is to emasculate and ultimately destroy representative government. Its adherents in their enthusiasm have advocated what seem to me some very wild and visionary schemes, admirably calculated to inflame the popular imagination, but which, however much they may increase the direct participation of the multitude in the affairs of government, will, I am persuaded, give them not a better but a far less efficient and desirable government than they now have. I do not mean to say that I am opposed to every suggested alteration in the existing governmental framework. To oppose a new thing simply because it is new is quite as bad as to insist upon change merely because it is change.

But I am opposed to the initiative, the *modern* referendum, and the recall, because I believe that if these innovations shall be generally put into practice the inevitable result will be the gradual breaking down of the strength and the ultimate destruction of our republican institutions, under which for a hundred and twenty-four years we have steadily advanced in population, wealth, and civilization, until we are to-day not only the greatest nation in the world, but the greatest that the sun has ever looked upon in all his shining course. In saying this I am not opposing any honest effort to eradicate the evils which exist under this form of government. There is a vital distinction, however, between a *bad plan* of government and the *imperfect operation* of a *good plan*. If legislation by representative bodies is sometimes unsatisfactory, inadequate, or corrupt, it is not because the plan of representative government is at fault, but because, although inherently good, it is badly administered.

Mr. President, I am no standpatter. I am not in favor of standing still. No one who takes the slightest thought desires that we shall do that. Of course, we must advance, but we must at our peril distinguish between real progress and what amounts to a mere manifestation of the speed mania. Among the games of the ancient Greeks there was a running match in which each participant carried a lighted torch. The prize was awarded not to that one who crossed the line first, but to him who crossed the line first with his torch still burning. It is important that we should advance, but the vital thing is not that we should simply get somewhere—anywhere—quickly, but that we should arrive at a definite goal with the torch of sanity and safety still ablaze.

Our present form of representative government, under which laws are made by specially chosen legislators, construed by specially chosen and trained judges, and enforced by specially chosen executive officers, I am firmly convinced is the only practicable form of government for a country of immense area and great population such as ours. Whenever it proves ineffective or works badly the fault is not with the machinery, but with those who are operating it. The remedy is not for the people en masse to attempt to manipulate the complicated and delicately adjusted mechanism, which must inevitably lead to confusion and disaster, but to exercise more care in the selection of their specially chosen operating agents.

Everybody will agree that the average man is not as intelligent, as able, or as honest as the ablest, or the most intelli-

gent, or the most honest. The individual fallibility of the average man will at once be conceded, but there are some people who seem to imagine that there is some mysterious virtue in mere numbers; that 10 men are necessarily more intelligent, more moral, and more honest than 1 man; that by adding together a thousand individuals, none of whom has ever gone beyond the multiplication table, some strange and weird transmutation results by which the combined mass is enabled to work out the most difficult problem in Euclid with the utmost accuracy. Thus, following out this highly intelligent theory, whenever one is anxious to have a message carried with the greatest haste from one part of the city to another, obviously the thing to do is employ not the *flectest* messenger boy in the service, but arrange with 10 or a dozen *average* boys to unionize the job.

The distinguished Senator from Oregon [Mr. BOURNE] is perhaps the greatest living exponent of this doctrine. His recipe, roughly stated, I understand to be this: Take the voices of 10 foolish men, 20 ordinary men, 5 rascals, 16 good citizens, and 3 wise men (if any such can be induced to join); mix them all up together, with the result, vox populi, vox Dei. It was in some such flash of inspired wisdom that the learned Senator, in the course of a speech delivered in this Chamber a few weeks ago, presenting to us his now well-known and justly celebrated "composite citizen," said:

The people can be trusted. The composite citizen knows more and acts from higher motives than any single individual, however great, experienced, or well developed. While selfishness is usually dominant in the individual, it is minimized in the composite citizen.

With growing confidence in this child of his creative genius, he next declares—evidently as the result of mature reflection, because the declaration constitutes one of the capitalized headings with which in his editorial capacity he has thoughtfully adorned his speech—that the

"COMPOSITE CITIZEN IS UNSELFISH."

The Senator immediately proceeds under this caption to tell us how the gratifying transformation from distributive selfishness to collective altruism is brought about by a process as interesting as it is ingenious. I quote again:

The composite citizen is made up of millions of individuals, each dominated in most cases by selfish interest. But because of the difference in the personal equations of the individual units making up the composite citizen there is a corresponding difference in the interests dominating said units.

Mr. President, let me pause long enough here to say that this is not a quotation from Herbert Spencer, though quite

as lucid and convincing as anything that learned philosopher ever wrote. But listen further:

And while composite action is taking place, friction is developed, attrition results, selfishness is worn away, and general welfare is substituted before action is accomplished.

I am unable to accept the frivolous suggestion advanced by some that this beautiful conception has been evolved from an overworked and hysterical inner consciousness; that friction and attrition can scarcely be expected to exercise an intelligent choice; and that what little general welfare there is in the combination to begin with is quite as likely to be worn away as selfishness. Solomon has told us that a fool may be brayed in a mortar with a pestle and his foolishness will not depart from him, but it evidently never occurred to that wisest of men that the result might have been far different if he had submitted a large number of fools to the process at that critical period *while composite action was taking place*. By a parity of reasoning a selfish citizen may be brayed in a mortar with a pestle and his *selfishness* will not depart from him, but contrariwise with a million selfish citizens. This aggregate selfishness may be entirely eradicated we are told, and general welfare—altruistic and delightful—wholly substituted by the simple application of friction and attrition *while* composite action is taking place. There are those who might become impatient if the process of regeneration should not become complete until the culmination of composite action, and so the learned Senator assures us “that general welfare is substituted *before* action is accomplished.”

Mr. President, this is comforting as far as it goes, but I could wish—not for my own sake, but for others—that the information were a little more definite respecting the exact stage of the process at which selfishness retires and general welfare appears on deck. Otherwise there will remain in the minds of some a not altogether unjustified apprehension that the attendant friction and attrition may become more or less tedious pending the arrival of general welfare, should the otherwise joyous process of composite action be unduly prolonged. But, Mr. President, shall we stop here? If we may rid ourselves of selfishness by this comparatively easy and inexpensive method, surely other human frailties and shortcomings may be eradicated in like manner. “While composite action is taking place” let “friction and attrition” exert their benign and regenerative power to rid us of ignorance and egotism and class hatred, and at least modify in some degree the tendency toward a some-

what exasperating "holier than thou" attitude, which, I fear, is growing upon some of the disciples of my honored friend, though he remains, God be praised, wholly unspoiled by any such unfortunate tendency himself.

But, Mr. President, in spite of all the distinguished Senator from Oregon has said, certain of the unregenerate seem to regard the "composite citizen" as being somewhat oversaturated with the irresponsible idealism of the Oregon school of government by ballot. At least one has confessed to a feeling of skepticism respecting even his bodily existence, in spite of the fact that the honorable Senator has privately assured him that this child of his creative genius is actually in our midst, albeit so spiritually refined and so delicately illumined by the influence of the modern uplift that only the sensitive eye of the faithful may behold him, or the hand of the faithful touch him. To the unregenerate he reveals himself only to the ear as a "voice crying in the wilderness," proclaiming the wickedness and folly of the entire order of things established.

When the fullness of the new dispensation shall be upon us, it will be made clear that any scheme of things which has endured for a period exceeding six months and which has only the poor merit of having worked fairly well in practice is inherently worthless as a guide to the conduct of advanced people. In short, the "composite citizen" holds to the doctrine that mere experience is an ass and that common sense is outlawed by the statute of limitations. Legislatures are to be swallowed up in the initiative and referendum, courts obliterated by the recall, political parties juggled out of existence by the direct primary, and upon their ruins will rise the recently organized Progressive League—which, by the way, just now seems to be progressing after the manner of a woman getting off a car, with its back to the front—as the supreme guide, philosopher, and friend of the "composite citizen," whose offices its members will continue to joyously fill and whose salaries they will continue to cheerfully draw. Then, indeed, will the political millennium be in sight. Every social and political evil will be eradicated by the simple but effective expedient of voting it out of existence.

All the operations of government—lawmaking, law construing, law executing—will be merged in the one supreme, all-embracing function of balloting. We may confidently look forward to that halcyon era when there will be primary elections to nominate candidates for office, preprimary elections to designate persons to become candidates for nomination, and

antepreprimaries to frame an eligible list from which to select preprimary candidates to run the gauntlet of the primary itself, to the end that only the good and virtuous may compete for the final suffrages of the people. Having selected our candidates by this sifting and resifting and reresifting series of *primary* elections, we will have *election* elections to determine who of these irreproachable persons shall become our officials, and then *recall* elections to get rid of them if we think on reflection that some undesirable material has slipped through a hole in the sieve. There will be elections to select lawmakers and elections to make laws for them; elections to select judges to construe laws and elections to determine whether we like the way they construe them; elections for men to execute the laws and elections to execute the executors if they do not execute to suit us. Mr. President, we can not have too much of a good thing. The "composite citizen," bearing upon his shield the inspiring device—

Count that day lost whose low descending sun
Views at thy hands no uplift voting done—

will unanimously and hilariously go into perpetual action. With nothing to do but feed and clothe a family of six or eight or ten hearty, growing children, the "composite citizen" will have no difficulty in snatching a few months of time here and there during the year to devote to these duties of progressive citizenship, and his spare moments can be utilized in reading, studying, digesting, and perhaps understanding a few volumes of proposed initiative and referendum legislation.

The "composite citizen," under the soothing influence of "friction and attrition," "while composite action is taking place," will embody all the virtues but none of the vices of the multitude from which he is compounded. An aggregate of more or less wise and more or less foolish, of more or less good and more or less bad, of more or less strong and more or less weak human atoms, he will himself be all wise, all good, all powerful. He will be the just man made perfect and the unjust man made perfect also.

I have been consulting the dictionary. Mr. Webster, whose vocabulary covered the *whole* linguistic field from which my honored friend from Oregon culls only the flowers, abruptly introduces the matter, as was his discursive habit, between two other wholly unrelated subjects, and treating the word "composite" as a botanical term, defines it thus: "Belonging to the order *compositæ*; bearing involucrate heads of many small florets, as"—the comparison is not mine, but that of the

learned lexicographer—"as, for example, the daisy." The speech of the Senator from Oregon had prepared us to agree with Mr. Webster that his "composite citizen" was a "daisy," but we were in no mood for this sinister qualification, "bearing involucrate heads." After these glowing eulogies from the eloquent lips of the Senator to which we had listened, after these unqualified indorsements respecting the virtue, the unselfishness, the wisdom—ah, Mr. President! above all, the wisdom—of this paragon, must there finally creep into our hearts the foul suspicion that, after all, the "composite citizen" has something serious the matter with his head? Involucrate heads! *Horribile dictu!* The subject becomes painful. Let us inquire no further, but for better or worse, accept this creation of the inspired intellect of our honored friend simply as a "daisy with an involucrate head," and, closing the dictionary with all its brutal and disturbing bluntness of speech, voluntarily leave ourselves shrouded in deep, but merciful, ignorance respecting the exact nature of the affliction.

Mr. President, my objection to the initiative and the recall is without qualification. My objection to the referendum is not to that method as applied from the beginning in this country to the ratification or rejection of fundamental law or as applied to broad questions of public policy. What I object to is not its continued *historical application*, but its proposed *hysterical extension* to matters of general and detailed legislation. The Arizona constitution, so far as it refers to the referendum, provides that either the legislature or 5 per cent of the qualified electors may order the submission to the people at the polls of any measure or item, section, or part of any measure enacted by the legislature, except certain emergency laws, which are enumerated.

It is wise and proper that before a proposed constitution or constitutional amendment should go into effect it be adopted by a vote of the people. The constitution of a State contains the broad, underlying principles within the limits of which the various representative agencies of the people must act. The sovereign power rests only in the people and they alone should lay down the general principles according to which their representatives shall act and establish the boundaries beyond which they may not go; but under these principles and within these boundaries there is a mass of detailed work to be done that requires the continuous and sustained effort of somebody in order that it may be done well. The people as a whole have neither the inclination, the specialized training, nor the time

requisite to enable them to master the thousand and one details necessary to qualify them to wisely discharge the functions of ordinary legislation. Men talk about the right of the people to make their own laws for their own government, and it tickles the fancy as a very high and noble sentiment, as it is, but it is a vain and idle performance to talk about the right to do a thing against the doing of which insuperable difficulties exist. To declare a general policy is a comparatively simple thing; to contrive the legislative machinery necessary to make the policy effective may be and often is an exceedingly complex and difficult task.

It is one thing to know that an evil exists and denounce it. It is quite another thing to put your finger on the cause of it, and still another to devise a remedy. After a late dinner you may have perfectly competent "inside information" that something has gone wrong, but be altogether unable to determine whether it was the wine or the cigar, the hot bird or the lobster salad, the olives or the *pâté de foie gras*. In such case you do not submit the matter to a referendum of the neighbors. You send for the doctor. All men, for example, may heartily agree as to the wisdom of regulating common carriers so as to insure fair and nondiscriminating treatment of all shippers and passengers, and the exaction of only fair and reasonable charges for services rendered. But, that much declared, we are only at the threshold of the difficulty. How shall it be done? What machinery shall be provided? There may be scores of divergent plans proposed. These are to be analyzed, compared, and contrasted, and in the end harmonized. There must be deliberate and intelligent interchange of views, the yielding of a detail here, the acceptance of a change there, amendment, and compromise. Such a process may call for weeks or months of laborious study, of careful sifting of conflicting claims as to law and fact, for technical knowledge, for investigation and thorough understanding of the preexisting legislation upon the subject. When all this is done and the law referred to the people to be adopted or rejected, how many will fit themselves to pass upon the question intelligently? Knowing that the law is to be submitted to the people, there will be a feeling on the part of the legislators that they have no responsible voice in the matter, but that the responsibility rests upon the shoulders of the electorate. Inevitably the same care in framing the proposed law will not be taken as where the final responsibility of enacting it into an enduring statute rests ultimately and alone upon the legislature itself. If an objectionable provision is found in the proposed law no method will exist, and in the

very nature of things none can be devised by which the objectionable provision can be eliminated at the polls. There will be no choice but to adopt the bad provision for the sake of the good or to reject the good provision for the sake of avoiding the bad.

And so one great objection to applying the referendum to matters of general legislation is that, however desirable or however imperative the need may be, no opportunity is afforded for mutual concession, or compromise of conflicting views, and amendment.

The weakening effect of the referendum upon the fitness and responsibility of the legislature was forcibly stated by Mr. Justice Johnson in the case of *Johnson v. Rich* (9 Barb., 686), where it was said:

I regard it as an unwise and unsound policy, calculated to lead to loose and improvident legislation and to take away from the legislator all just sense of his high and enduring responsibility to his constituents and to posterity by shifting that responsibility upon others. Experience has always shown that laws passed in this manner are seldom permanent, but are changed the moment the instrument under which they are ratified has abated or reversed its current. Of all the evils which afflict a State, that of unstable and capricious legislation is among the greatest.

In the case of *Barto v. Himrod* (8 N. Y., 483, 496), Mr. Justice Willard, speaking upon the same subject, no less wisely and forcibly said:

If this mode of legislation is permitted and becomes general, it will soon bring to a close the whole system of representative government, which has been so justly our pride. The legislature will become an irresponsible cabal, too timid to assume the responsibility of lawgivers, and with just wisdom enough to devise subtle schemes of imposture to mislead the people. All the checks against improvident legislation will be swept away, and the character of the Constitution will be radically changed.

The population of a State is not homogeneous throughout the State. There are, for example, sections devoted to agriculture, others to mining, others to manufacture, others to cattle and sheep raising, and so on. There is the division of our population between the great cities and the country. The advantage of the representative plan of legislation is that representatives are elected from these various sections so widely differing in their manner of living, in their habits of thought, and in their material interests. In the legislative assembly all these are represented, their views and interests heard and considered. In shaping laws of general application light is shed from all directions, the question is considered from every angle of vision. In the

case of direct legislation the inhabitants of a city may look at a question in one way, those of the country in another. Farming sections may have one view, mining sections another, and manufacturing sections still another. If the city vote largely predominates in a State, it is the city view which is likely to prevail. If the rural vote predominates, it is the view of the country which will probably prevail, and legislation is more apt to reflect class interest and class prejudice than where consideration is given in a deliberative body where the views of all may be fairly and fully considered and harmonized.

A government of the people in a territory of vast extent, of large population, and of great and increasing diversity of pursuits and interests, can be administered only by a system of representation. It is almost as impossible for the people en masse under such circumstances to directly perform the various functions of government as it is for the human body in its entirety to perform the functions of the heart or the brain or the lungs. In a primitive state of society the one may be done, as in the most primitive forms of life the other may be done, but as society becomes complex and as the forms of animal life become complex special organs to discharge special functions are necessary.

Mr. Woodrow Wilson, in his very valuable book, "Constitutional Government in the United States," has expressed the thought clearly and forcefully. He says:

A government must have organs; it can not act inorganically by masses. It must have a lawmaking body; it can no more make law through its voters than it can make law through its newspapers.

Thus spoke the president of Princeton University, in the days of his tranquillity, before the microbe of political ambition had invaded his system.

That this view does not seem to be shared by the governor of New Jersey is one of the peculiarities of human psychology which I do not attempt to explain. I can only say that I prefer the calm, reflective judgment of the college president to the fevered hallucinations of the hopeful presidential candidate. Those who indorse his later utterances, reversing the ancient epigram, are simply appealing from Philip sober to Philip drunk.

Those who favor the initiative and referendum are in the habit of referring to the Swiss experiment with those methods. If it should be conceded—as it by no means can be—that the initiative and referendum are successful in Switzerland, the conditions in that country differ so radically from conditions here that it does not follow that they would be successful in the United States.

The Cantons in Switzerland are small in area and in population. The people are essentially homogeneous and conservative. Their legislative needs are few and simple. None of the legislative checks which exist under our system of government exist there. There is no executive veto, no judicial power of setting aside unconstitutional law, and there is only a single legislative chamber in each of the Cantons. But even under these conditions thoughtful men who have investigated the matter agree that more harm than good has resulted from their employment.

Mr. Wilson, already quoted, has given the subject very thorough and careful investigation. Speaking of the referendum, he says:

Where it has been employed it has not promised either progress or enlightenment, leading rather to doubtful experiments and to reactionary displays of prejudice than to really useful legislation.

He refers to the fact that in the Cantons of Zurich and Berne it led to the abolishment of wise health regulations; that in Federal legislation it was used only to aim a blow at the Jews under the guise of a law forbidding the slaughter of animals by bleeding. He says:

The vote upon most measures submitted to the ballot is usually very light; there is not much popular discussion, and the referendum by no means creates that quick interest in affairs which its originators had hoped to see it excite. It has dulled the sense of responsibility among legislators without in fact quickening the people to the exercise of any real control in affairs.

If it has thus failed in the comparatively simple affairs of small Switzerland, how much more dismal must be the failure in this country, with its vast and complex affairs.

The experience of every State in the Union where the referendum is in force, even as to constitutional amendments, is that, notwithstanding the comparative simplicity of the questions submitted, only about one-half or two-thirds of the people voting for candidates cast their votes for or against the proposed amendments. The remainder, from ignorance or indifference, do not attempt to pass upon the questions at all, and even of those voting it is safe to assume that no very large proportion have really taken the time to study and understand the questions submitted. I know from my own observation that of the persons who vote one way or the other many vote against proposed constitutional amendments because they have not taken the trouble to inform themselves as to the merits, and, on the other hand, many others vote for the amendments without understanding them and wholly on the strength of

somebody's statement that they are all right. In a recent election held in South Dakota 13 proposed laws were submitted to the people under the referendum and every one of them was rejected at the polls, not because they were all bad, but because, as I am informed upon high authority, the mass of the people would not take the trouble to distinguish between the good and the bad, but voted against them all in utter disgust at the unwelcome task which they had been called upon to perform.

Attention has sometimes been called to the fact that direct legislation by the people is not a new thing. The New England town meeting has been cited as a case in point, but in these mass assemblies the people met face to face. There was opportunity for an interchange of opinion, for discussion, for the refining influence of deliberation and amendment. Those who, upon the one hand, favored the law, and those who, upon the other hand, opposed it, presented their views and assumed the responsibility for them.

This did not differ greatly from the process now in operation under our representative form of government, where the people, being so numerous that they can no longer meet and exchange their opinions, delegate their authority to agents, who assemble and publicly discuss their views, openly assume responsibility for them, and pass laws after full opportunity for discussion and amendment. The secrecy and the limitations of the ballot box are a poor substitute for these open and thoroughgoing methods.

In Mr. Wilson's work on "Constitutional Government in the United States," from which I have already quoted, he illustrates the difference between the judgment which men arrive at after a real interchange of views such as takes place in a deliberative assembly and the judgment which is likely to result under the initiative and referendum. He says:

Common counsel is not aggregate counsel. It is not a sum in addition, counting heads. It is compounded out of many views in actual contact; is a living thing made out of the vital substance of many minds, many personalities, many experiences; and it can be made up only by the vital contacts of actual conference, only in face-to-face debate, only by word of mouth and the direct clash of mind with mind.

All the objections which apply to the modern referendum apply with increased force to the initiative; and, in addition, there is the further objection that the proposed law is not even framed by any deliberative or responsible body. Under the Arizona constitution 10 per cent of the qualified electors are given the right to propose any measure and 15 per cent the right to propose any amendment to the constitution. A more

sweeping and comprehensive repudiation of representative legislation could not well be imagined. Apparently the constitutional convention realized that perhaps they had gone too far, and so it was provided that initiative and referendum laws should not transcend the constitution. This provision itself shows the confusion of mind under which the framers labored, because to provide that an initiative law shall not transcend the constitution is of little avail when the constitution itself may be altered by an initiative amendment with equal ease and simplicity. Here there are no limitations, and therefore legislation of any character may be as readily tacked on to the constitution in the form of an amendment as it may be passed in the shape of ordinary law.

Under the initiative as thus provided proposed laws will, of course, frequently be drafted by a coterie or clique of interested persons, perhaps all of one way of thinking. It will not be considered and debated in public as legislative enactments are; there will be little, if any, opportunity for the consideration of opposing views in framing the law. The power of compromise, which is a necessity in the making of laws, will be wholly absent. There are certain radical reformers who decry all compromise as being a partial yielding to wrong. They recognize no middle ground and demand that we shall stand for the right without yielding the breadth of a hair.

But this is a mere begging of the question. Right and wrong in governmental matters are not always, indeed, not generally, divided by any sharp line which will enable us to put our finger upon one side and say this is exactly right and upon the other and say this is utterly wrong. The boundary between the two is a doubtful zone in which the extent of the uncertainty gradually diminishes as we proceed outwardly in either direction, until upon the one side we reach the clear field of indisputable right and upon the other of unmistakable wrong. But it is precisely in this middle ground of uncertainty—where honest people differ—that the deliberate interchange of conflicting opinion is necessary and the legislative function finds its field of greatest activity, and it is precisely here that the initiative would most signally fail, because the proposed law would be framed, not by those who see the situation from different angles, but by those who all occupy the same point of view. It is not difficult to obtain signatures to any petition, and the initiative petition will constitute no exception to the rule. Given an active, energetic, self-constituted committee, and 10 per cent of the voters of the State can be readily obtained to sign petitions proposing

any kind of a law that anybody will want. Those who sign the petition—at least 10 per cent of the voters of the State—will be committed to it in advance; its sponsors will be active in advocating it; “what is everybody’s business is nobody’s business,” and in all likelihood, after the novelty of the system has worn off, interest will largely disappear and very few people will be found who will take the trouble to combat even a foolish or bad provision. A very large proportion of the voters will refrain from voting at all upon the question, and under these conditions, with active and interested work done in behalf of the law and a half-hearted opposition, or none at all, the chances are altogether in favor of the adoption of more unwise laws than ever get through our legislatures.

In Oregon at the last election 32 laws were submitted, either under the initiative or the referendum provision of the constitution. These proposed laws, together with a few brief and meager arguments in favor of and against some of them, are contained in a pamphlet covering 202 closely printed pages, to be studied, digested, and thoroughly understood before intelligent action could be had, presenting to the people, busy with their own affairs, a most difficult, perplexing, and burdensome task; a task which, in the very nature of things, must have been performed by the great majority in the most perfunctory manner or not at all. These laws are upon all sorts of subjects. There is a bill prohibiting the taking of fish from the waters of Rogue River, which would seem to be a police regulation affecting a limited part of the State and with which the people in remote sections would not be sufficiently concerned to give the subject very laborious consideration. There are a number of bills to create new counties, to allow certain counties to pay additional salaries to their judges, of which the same may be said. Either at this election or a preceding one this somewhat peculiar situation was brought about. In the lower part of the Columbia River salmon fishing is carried on by means of nets; in the upper part by means of fish wheels. That, as I understand, is due to the current. In the lower part of the river the current is comparatively slight, while in the upper part of the river the current is much stronger. The net fishermen, being opposed to the wheels, proposed a law under the initiative prohibiting all fishing by wheels. The wheel fishermen, being opposed to net fishing, proposed a law prohibiting the taking of fish with nets. The matter being submitted to the wise and discriminating “composite citizenship” of that State, both laws were adopted by good round majorities,

with the amiable result that thereby the taking of salmon by any effective method was prohibited altogether.

A law proposing to compel railroad companies to give free passes to all public officials received nearly 30,000 votes out of a total of less than 90,000.

A bill to create a "board of people's inspectors" was gravely submitted under the initiative by the People's Power League of Oregon, the board to consist of three persons to be selected in the first instance in the following highly popular manner. The executive committee of the State grange, the executive committee of the Oregon State Federation of Labor, and the presidents of the boards of trade and commercial organizations of Oregon were each to name three persons, and from each of these groups the governor was to select one for appointment. The people generally were not to be consulted. The "composite citizen" was notified to go on a vacation. It was made the duty of this board of censors "to have at least one of their number present at all times at every session of each house of the legislative assembly, and to be watchful for any defect or imperfection in the State and local systems of government." They were to watch the public officers and public institutions, the departments of the State and county and municipal governments, and to investigate and report on their management. They were imposing upon them a pretty large contract. All this was to be done, the proposed law naively provided, "without motive or desire for personal or partisan advantage." They were, moreover, "to be as fair and impartial to all citizens and officers as the supreme court seeks to be between parties to a suit." "As the supreme court *seeks* to be" is distinctly good. What the supreme court merely *sought* the censors for the people were bound under the mandate of the law to actually find and put into practical operation. They were to publish an official gazette not only of their own reports but also of any criticisms or complaints of their own official acts. These criticisms, however, under the law, are thoughtfully limited to not exceeding 200 words each; their own reports are to be without limit.

Reports by the governor, county officials, mayors of cities are to be published, but all of these are to be "brief and comprehensive." If they can not be made comprehensive without sacrificing brevity, we are not enlightened as to what shall be done. They are also to publish in this gazette a large number of other specific matters, and, finally, "other matters that they believe will promote the general welfare." Apparently there are to be no canvassing agents for this publication, the law

directing that every registered voter who is either the head of a family or a member of no family shall be considered a subscriber, and the gazette mailed to him at public expense. The inhabitants of the benighted regions outside of Oregon must pay \$1 a year in advance. It will be observed that every provision is made whereby the censors will watch everybody else and report their lapses, peccadillos, and shortcomings to the people, but, unhappily, no provision is made for watching or reporting upon the censors themselves. This unique piece of legislation, it must be borne in mind, was not proposed as a joke. The People's Power League of Oregon were as solemn about it as the Senator from Oregon has been in pointing out the virtues of the "composite citizen." Thirty thousand people in the State of Oregon voted for it, or considerably more than one-third of all those voting. A change of 11,000 votes would have carried it. When the State becomes truly progressive it probably will be carried. In the meantime the "composite citizen" must censor for himself.

The People's Power League, however, proposed another law, which was adopted by a small majority, namely, the law providing for the election of delegates of the several political parties to their respective national conventions, every delegate so elected being entitled to receive from the State treasury the amount of his traveling expenses necessarily spent in attending the convention, not to exceed \$200. Hereafter when any group of enterprising gentlemen may desire a pleasure trip at the public expense, all they will need to do will be to organize a party, call a national convention, and elect themselves delegates.

I should not like to suggest that any of these visionary schemes are being advocated by anybody from motives of self-interest, and yet that sort of thing sometimes happens in this cold and selfish world. I remember hearing of an individual who appeared before the common council of a certain city and in a fiery speech denounced a proposed ordinance restricting the speed of automobiles within the city limits as being a tyrannical and unwarranted invasion of the personal rights of the citizen. A councilman asked the objector how many automobiles he owned, to which he replied: "I don't own any. I'm an undertaker."

The excuse for the adoption of the initiative and referendum is that the people can no longer trust their representatives; that legislatures will not obey the popular will; that they are dishonest and corrupt and controlled by the interests. The

initiative and referendum, therefore, proceeds upon the obvious fallacy that a democracy which has not the wisdom or the inclination to select honest and capable men to make laws can wisely perform the infinitely more complex and delicate function of making the laws directly. It would follow, I suppose, that any man who is incapable of selecting a competent physician would be thoroughly qualified to heal himself. The enduring basis of representative government is that it affords the opportunity for the whole people to select from among themselves those who can govern for them better than the people, because of their vast number and their other duties, can govern for themselves. For a people to confess their inability to do this is only short of confessing an inability to govern at all. Under the initiative and referendum it is not proposed to do away with our legislators; they are to continue. If, knowing that our legislators adopt laws for us in their final form, we still can not select capable men for the office, our inability will be intensified under the power to initiate laws for ourselves. If power is reserved by the people to pass a law which the legislature ignores, or to veto a law which the legislature passes, it will be argued the consequences of having dishonest or incapable legislators are not so serious, the need of care will not be so great, and the use of care in the selection of representatives will constantly diminish.

The referendum in the past has been confined to the adoption of organic law, and this has served to accentuate the vital difference between the constitution and ordinary legislation. If the referendum shall be applied to the making of law generally, the people will inevitably lose the high regard which they now have for their constitutions, and in the end the distinction between the organic law of the State and ordinary legislation will disappear. Constitutions are made not only for the purpose of confining the representative agents of the people within definite boundaries, but also for the purpose of preventing hasty, ill-considered, and unjust action on the part of the majority of the people themselves. The written constitution is the shelter and the bulwark of what might otherwise be a helpless minority. Tyranny is no less hateful in the hands of the people than in the hands of the despot, and the oppression of the minority by the majority is tyranny no less than is the arbitrary oppression of the king. The forward march of democracy will be of little avail if in the end it rescue us from the absolutism of the king only to hand us over to the absolutism of the majority. And so we provide that the govern-

ment shall be administered by representatives who are to act not for a part of the people, but for all, thereby, in a sense, expressing our distrust in the hastily formed opinions of the temporary majority, but declaring our lasting confidence in the wisdom and the justice of the persistent majority. The demand for direct legislation by the people ignores this distinction and violates, if not the letter at least the spirit, of this constitutional compact.

It is the recall provision of the Arizona constitution, however, which, to my mind, is fraught with the greatest mischief. That provision, briefly stated, is that every elective officer in the State of Arizona is subject to recall by the qualified electors of the electoral district from which he was elected whenever such recall is demanded by a petition signed by electors equal to 25 per cent of the votes cast at the last preceding general election.

The grounds upon which the recall is based must be stated in not more than 200 words. The officer is given the alternative of resigning his office within five days after the filing of the petition. If he does not resign, a special election must be held not less than 20 nor more than 30 days after the making of an order to that effect. The reasons given in the petition for demanding the recall are to be set forth in the ballots, together with the officer's justification in not more than 200 words. Other candidates for the office may be nominated, to be voted for at said election, and the candidate receiving the highest number of votes shall be declared elected for the remainder of the term. No recall petition shall be circulated until the officer has held his office for a period of six months, except as to members of the legislature, in which case a petition may be circulated at any time after five days from the beginning of the first session following his election. After one recall petition and election, further petitions may be circulated and further recall elections held if the petitioners shall pay into the public treasury the expenses of the preceding election.

The power of recall, it is seen, includes all officials—legislative, executive, and judicial. Attempts have been made to show that the recall is not a new thing in this country, and we are referred to Article V of the Articles of Confederation, which reserved to each State the power to recall its delegates at any time within the year for which they were appointed and to send others in their place for the remainder of the year. Passing by the distinction between an officer elected by the people and a mere delegate appointed by a State to represent its interests in what was little more than a general convention, it is sufficient

to say that the whole scheme of the Confederation was found to be so utterly ineffective that it was abandoned at the end of a few years, and the enduring National Government which we now have put into its place. The framers of the Federal Constitution evidently regarded the recall feature of the Confederation as an unwise precedent to follow, and it found no place in that great instrument, as for more than 100 years the ballot-box recall found no place in the plan of government of any State.

The inevitable tendency of the recall will be to give us a set of weak and spineless executive and legislative officials, no longer having the courage or the inclination to act upon their own initiative and responsibility, but with their ears always to the ground to catch the first indication of the popular drift in order to anticipate it. They will soon cease to distinguish between the settled, deliberate judgment of the people to which they should yield a willing obedience, and the passing whim of the moment, against which the ultimate best good of society may demand the assertion of a sturdy opposition. Such a provision, I firmly believe, is more likely to result in the recall of good officials than of bad ones, because the time-serving, unscrupulous politician will be swift to conform his action to every shifting opinion of his constituents, while the official of honesty and integrity and courage, who prefers his duty to his office, will stand for what he believes to be right and sound and wise, even though for the time being he may stand alone. It has happened very often that the governor of a State or the mayor of a city has incurred the violent opposition of a temporary majority by the announcement of a policy which, when put into operation, has been found to work to the advantage and upbuilding of the community. With the recall in existence, such an officer would have been swept out of office in response to a spasmodic impulse, afterwards found to be wholly unwarranted. It is far better in the long run that our public officials be permitted to serve out the short terms for which they are elected, unless they so conduct themselves as to become amenable to removal by impeachment or by punishment under specific provisions of law.

A republic has been well defined as "an empire of laws and not of men," and John Adams, who quotes this definition with approval (Adams's Works, vol. 4, p. 194), adds:

That form of government which is best contrived to secure an impartial and exact execution of the laws is the best of republics.

The recall contemplates not an "empire of laws" to be executed with impartiality and exactness, but an empire of men

who punish not according to some fixed and definitely prescribed rule, but according to their undefined, unrestrained, and unlimited discretion, conceived, it may be, in prejudice and delivered in careless ignorance of the facts, administered not in the sight of all men, but in the secrecy of the ballot box, where it can never be known whether the voter judged according to the poised and balanced scales of justice or struck with the knife of the assassin.

It is sometimes said that if people can be trusted to elect and reelect officers with fairness they can be relied upon to administer the recall with fairness. The two powers are essentially different. We elect one man and defeat another, not because the one defeated is bad or unfit, but because the man elected is preferred for reasons which may be wholly aside from the merits of the respective candidates. Such a defeat carries with it ordinarily no reflection upon the ability or the integrity of the defeated. But to recall an official is a declaration of his unfitness, and carries with it reproach and dishonor. When an official seeks reelection the people pass upon his record as a whole, not merely upon some isolated act. Under the recall he occupies the position of an accused defendant seeking to avoid condemnation, and the attention of the people is concentrated upon the particular acts complained of, and his record, taken as a whole, receives little consideration. The difference between being rejected at an election and being recalled is the difference between not receiving an invitation to enter at the front door and being kicked out of the back door in disgrace. The recall necessarily involves the exercise of judgment respecting the rightfulness or wrongfulness of official conduct. The whole genius of our institutions demands that before a decision of this character shall be effected there shall be an opportunity to confront the accusers and to hear the accusation according to the settled and orderly methods of the law, and that judgment, after a full hearing, shall be rendered by an impartial tribunal. Anything less than this, whatever it may be called, is in essence nothing but lynch law. The people themselves will soon lose all regard for a representative who "lives and moves and has his being" in the fear of their spasmodic punishments.

While I thoroughly disapprove of the initiative and the modern referendum and the recall as applied to executive and legislative officers, I could well subordinate my judgment to that of the people of Arizona if they had not gone further and provided that the recall should embrace the judiciary as well. The power to recall a judge who renders an unpopular judgment

is to my mind so utterly subversive of the principles of good government that I can never get my own consent to withhold my condemnation and disapproval of it.

The Senator from Oregon—not the father of the “composite citizen,” but the junior Senator, Mr. CHAMBERLAIN—in his speech of April 17 last, asks:

But as an abstract proposition, why should a judicial officer be independent of the wishes of his constituents?

Ah, Mr. President, much of the vice and fallacy of the argument for the right to recall judges rests in this assumption that the judge, like a Congressman or a legislator, represents a constituency. What is a constituent? He is a person for whom another acts. A constituent implies as a necessary corollary, a representative who speaks for him. A judge has no constituents; he is only in a restricted sense a representative officer at all. The people who elect him can with propriety make known their wishes only through the laws which they enact. The judge is the mouthpiece of the *law*. His constituents are the *statutes* duly made and provided. If his decisions are wrong, the remedy is to appeal to a higher court—not to the people. The scales of justice must hang level or there is an end of justice. The recall puts into the scale, upon one side or the other, in every case where strong public feeling exists, the artificially induced anxiety of the judge for the retention of his place. Bound by all the sacred traditions of his office to decide impartially between the parties according to the law and the evidence, he begins the discharge of his high duties with a personal interest in his own decision.

The judge represents no constituents, speaks for no policy save the public policy of the law. If he be not utterly forsworn, he must at all hazards put the rights of a single individual above the wishes of *all* the people. He has no master but the compelling force of his own conscience. Every circumstance which diminishes his independence and his courage, which closes his ears to the righteousness of the cause and opens them to the voice of clamor, makes for injustice.

If charged with incompetency, dishonesty, or corruption, common fairness demands that he should be tried in the open before an impartial tribunal, where he may be heard, not with a limitation of 200 words upon his defense, but in full, and where he may face his accusers and test the truth of their accusations by those orderly methods of procedure which the experience of centuries has demonstrated are essential to the ascertainment of truth. But the recall institutes a tribunal

where everybody decides and nobody is responsible; where at least 25 per cent of the membership have already, as the judge's accusers, prejudged his case, and from whose arbitrary and unjust findings there is no appeal. In such a forum idle gossip and village scandal stand in the place of evidence; assertion takes the place of sworn testimony; and the foulest lie goes unchallenged by the touchstone of cross-examination. The voter will make up his verdict of vindication or conviction under the illuminating radiance of the torchlight procession, in the calm, judicial atmosphere of the brass band and the drum corps, and upon the logical summing up of the spellbinder and the campaign quartet.

Mr. President, I am not one of those who have become impatient at the restraints and checks and safeguards of the representative form of government and the written Constitution. I am not one of those who would launch the ship of state, with every sail set, upon the wide sea of tossing waters—with all its unsounded depths and unknown shallows, with here a whirlpool and there a half-submerged rock—without a chart or a compass or a rudder or an anchor, trusting alone to the merciful chance of wind and wave and the tumultuous efforts of an uncaptained crew to preserve it from disaster. I disagree utterly with the distinguished Senator from Oklahoma [Mr. OWEN], who told us a few days ago in that calm, judicial way of his, that the Constitution of the United States—for which some of us had conceived a rather high opinion—was all wrong; that it was not sufficiently democratic; that it was so drawn by Madison and those who were in the Constitutional Convention as to vest unfair power in the hands of the minority, and that this principle shows from one end of it to the other; that, among other things, to his deep regret, he had been unable to discover in that worn and antiquated document any provision for the recall of the Supreme Court of the United States. There are some individuals in this country who ought to be prosecuted for monopolizing so much of the wisdom that a discriminating Providence intended should be distributed in modest proportions among a somewhat extended number of people. I do not mean to say that the Senator from Oklahoma is one of these, but I feel sure that it was a distinct misfortune that he did not make his appearance at a date sufficiently early to give the fathers who framed the Constitution the benefit of his counsel and advice. I am not certain that in that event the Constitution would have been better, but I am sure it would have been longer than it is. At any rate, it is a great pity that

the Senator from Oklahoma could not have been privileged to point out at that time the high-handed disregard of its framers for the rights of the people which he points out with such conclusive finality now.

For a century and a quarter the great names of Washington, who was the president of the convention; of Benjamin Franklin, Alexander Hamilton, Robert Morris, James Madison, James Wilson, Charles Pinckney, Rufus King, and all the others of the immortal list, have occupied a shrine of glory in the hearts of the misguided multitude as the framers of a Constitution which, instead of being undemocratic "from one end of it to the other," is inspired "from one end of it to the other" with the thought that the day when the king commands and the people obey has gone, and that the new day has risen when the people shall command and the king obey.

But we have all been mistaken. The fathers, in framing the Constitution, were unpatriotic and undemocratic. They were engaged in turning over an amiable majority to the mercy of a ferocious minority; in setting up a government that could not be overturned by every breath of popular emotion; in creating a responsible and independent judiciary; and in other similar unholy and reprehensible enterprises, for which, I have no doubt, the enlightened "composite" citizenship of Oklahoma would, if they had the opportunity, commit them to the county jail as a gang of nonprogressive, standpat aristocrats.

Against these criticisms of the Constitution by this American Senator I would put the strong words of the great English commoner, who described it as "the most wonderful work ever struck off at a given time by the brain and purpose of man." Against the petulant view of this American Senator, that this learned, courageous, and patriotic court should be made responsive, by means of the recall, to the changing moods of the majority, I would set the vigorous statement of another Englishman, Mr. Bryce, who said:

The Supreme Court is the living voice of the Constitution; that is, of the will of the people expressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guaranty of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction.

To discharge these momentous functions the court must be stable, even as the Constitution is stable. Its spirit and tone must be that of the people at their best moments. It must resist them the more

firmly, the more vehement they are. Intrenched behind impregnable ramparts, it must be able to defy at once the open attacks of the other departments of the Government and the more dangerous, because impalpable, seductions of popular sentiment.

Against all such wild and visionary demands for the popular recall of the judges I would print in letters of living light the strong words of Chief Justice Marshall:

The judicial department comes home, in its effects, to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, *with nothing to influence or control him but God and his conscience?*

Sir, I hope I am not given to overextravagant statement, but I declare my solemn conviction that the moment a provision for the recall of the judges of the Supreme Court shall be written into the Federal Constitution, that moment will mark the beginning of the downfall of the Republic and the destruction of the free institutions of the American people.

And now, Mr. President, what is to be the next step in the onward march? Will it be to apply the referendum to judicial matters? Why not? If laws can be made by the simple formula of counting heads at the ballot box, why not laws construed and questions of fact unraveled by the same infallible method?

Such a device would seem to be the fitting complement of the recall. When a court is confronted with a particularly perplexing case in which there is great popular interest and warm public feeling, where the precedents of the law and the sentiment of the people are both conflicting, and the poor judge is driven to his wits' end to harmonize the one and accurately interpret the other, instead of putting him to the uncomfortable alternative of rendering a judgment which, however satisfactory to himself, may not meet the preponderating fancy of the multitude, surely he might have the benefit of the ballot-box opinion *before* instead of *after* he has decided. This *may* result in more or less disappointment to the losing litigant; it *will* result in a good deal of uncertainty respecting the law, but the judge will be saved and the power of the people vindicated.

Sir, the suggestion is not so fanciful as it may at first appear. In the wild witches' dance which is only just beginning the nimble feet of the "composite citizen" seem destined to cut livelier capers and more bewildering pirouettes than even this. An enterprising district attorney in southern California has already proposed to submit to the taxpayers of the county, if

a way can be found, the question as to whether he shall further prosecute a case of arson in which the jury has already twice disagreed, upon which proposition the editor of the San Diego Herald comments in the following deplorably heterodox language:

THE REFERENDUM.

District Attorney Utley, in the Schoneck case, has made a wonderful proposition to the people of San Diego. After admitting his inability to secure a conviction, he asks the people to instruct him as to his duty. This sounds more like the utterance of a cunning politician than the words of a man.

If Schoneck is innocent, the district attorney should not try to convict him. If he is guilty and the evidence is procurable, the case should be fought to a finish at any cost. If the district attorney feels that the man is guilty, but that it is impossible to procure evidence to convict, then he will do his duty and save the taxpayers much cost by dismissing the case. It is a matter wholly in the hands of the district attorney, and a man of caliber in that office would use his own judgment in the matter.

It may seem like a delicate compliment to refer the matter to the people, but it really looks cowardly. Of course, an official who has made frequent blunders which the people are not slow to criticize may be overly sensitive and therefore may take such a course, thinking it may satisfy the public.

Those who are so intemperately appealing to the people to take over the *direct* management of their government, with its multiplicity of detail and difficulty, the successful operation of which demands concentration of effort and thoroughness of application, are preparing the way for future mischief. They are advocating a political creed alluring to the imagination, but utterly impossible of successful realization, and which, if adopted, will lead us more and more into the domain of the impracticable, with political chaos or political despotism as the ultimate result. It is the old contest between idealism and stubborn, matter-of-fact reality. It is the story of the philosopher's stone over again—the dream of transmuting all the metals into gold—the hunt for the master key that will open all locks, however different in size and shape—the problem of fitting square pegs into round holes—the puzzle of how to eat one's cake and have it—the search for the chimera of perpetual motion—the quest for the mythical pot of gold at the foot of the rainbow—and all the other impossible undertakings which have vexed men's souls and turned their brains and filled the lunatic asylums since mankind was divided into those who see facts and those who see visions. Finally, this latest delusion of having everybody drive the horses and everybody ride in the coach at the same time must share the fate of all the others,

for it is now as it has always been, that the pursuit of the unattainable is the most profitless of human occupations.

Under the initiative and referendum the people will occasionally get a law they want which the legislature will not pass; under the recall they will occasionally get rid of a man who never should have been elected; but under the *system* they will in the end get legislators that no thoughtful people ought to have and judges whom no free people should be satisfied with. The legislators will be driven to yield their own function of deliberation and their own independent judgment as to what is wisest and best and become mere recording agents. The executive officers will become less and less self-reliant men and more and more automatic machines, until some day, in the face of some great crisis, the people will awake to the affrighted realization that their government is in the hands of men who have lost the courage and the wisdom to act upon their own responsibility at all.

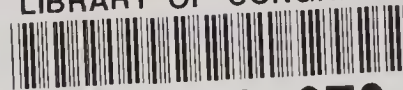
Mr. President, in the main and in the long run changes which come by the gradual and orderly processes of evolution are better and far more enduring than those brought about by the spasmodic methods of revolution. Experience is a safer guide than prediction. The tree is known by its fruits rather than by its blossoms, for sometimes the fairest blooms, like the fairest promises, produce no fruit at all. The rules of government that have been tried, that have been rounded into shape by years of practical use, that have stood the strain and pressure from every direction, are not to be lightly cast aside in order that we may put high-sounding experiment in their place. The strength and the glory of the common law, which is but the crystallized common sense of the clear-thinking English race expressed in definite form, is that it has been gradually developed by hundreds of slow years of application to the diverse and changing needs of society, until it has become fitted and molded and adjusted to all the conditions of life. And so, sir, with the great principles of our Government. Like the common law, they are a growth, not an invention. Year by year they have developed in enduring strength, striking their roots deeper and deeper into the intimate life of the people. They have withstood the specious opposition of the doctrinaire and the theorist, as well as the open shock of armed conflict. The preservation, the renewal, the strengthening of the old faith in their efficiency and virtue I regard as essential to our continued development along sane and symmetrical lines.

If the visionary and the dreamer, the agitator and the demagogue, could succeed in tearing them from the stately edifice of constitutional government, which, builded by the wise and loving hands of the fathers and cemented by the blood of the Civil War, has proven the sure refuge and shelter of all our people throughout the years in time of stress and trial, no man can foresee what miserable and inadequate makeshifts might be set in their place. Mr. President, I look with grave apprehension upon the present-day tendency to overturn, uproot, and destroy these vital and fundamental principles of representative government under which we have made and are making the most wonderful moral, social, and material advancement mankind has ever beheld. But, sir, I preach no gospel of despair. My sure confidence rests in the saving grace of the sober second thought of the American people, for, in the last analysis, we are a practical and a conservative people, sometimes, it is true, dreaming with our heads in the clouds, but always waking to the realizing sense that we must walk with our feet upon the earth. Sometimes the haunting spell of the darkness is upon us, but in the end the night goes, "the dawn comes, the cock crows; the ghost vanishes"; we open our eyes and all the uneasy and terrifying visions disappear in the light which fills the east with the glowing promise of another morning.

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